

1  
2  
3  
4  
5  
6  
7  
8 UNITED STATES DISTRICT COURT  
9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10  
11 LUOS M. SALAS RAZO, on his own  
12 behalf and on behalf of all others similarly  
situated,

13 Plaintiff,

14 v.

15 AT&T MOBILITY SERVICES, LLC,

16 Defendant.  
17

No. 1:20-cv-00172-NONE-HBK

ORDER DENYING MOTION TO DISMISS  
OR IN THE ALTERNATIVE TO STAY

(Doc. No. 10)

18 **INTRODUCTION**

19 This case proceeds on plaintiff Luis Razo's second amended class action complaint  
20 ("SAC"),<sup>1</sup> which alleges generally that defendant AT&T Mobility Services, LLC underpaid him,  
21 issued him unlawful wage statements, and withheld wages it owed him after his employment  
22 ended, all in violation of various provisions of the California Labor Code. (Doc. No. 9.) Plaintiff  
23 seeks to represent a class and sub-class made up of similarly situated employees of defendant.  
24 (*Id.*, ¶¶ 44–48.) Before the court for decision is defendant's August 13, 2020 motion to dismiss  
25 or to stay this action. (Doc. No. 10.) Plaintiff filed an opposition to the motion (Doc. No. 11),  
26 and defendant replied (Doc. No. 15). The matter was taken under submission on the papers  
27

28 <sup>1</sup> Plaintiff's initial complaint was removed to this court on January 21, 2020, on the basis of  
jurisdiction under the Class Action Fairness Act, 28 U.S.C. §§ 1332(d)(2). (Doc. No. 1.)

1 pursuant to Local Rule 230(c). On August 2, 2021, plaintiff filed a notice of supplemental  
 2 authority informing the court of a relevant California Supreme Court decision. (Doc. No. 21.)  
 3 For the reasons set forth below, defendant's motion to dismiss or stay will be DENIED in its  
 4 entirety.<sup>2</sup>

## 5 DISCUSSION

### 6 A. Motion to Dismiss for Failure to State a Claim

#### 7 1. Legal Standard

8 The purpose of a motion to dismiss pursuant to Rule 12(b)(6) is to test the legal  
 9 sufficiency of the complaint. *N. Star Int'l v. Ariz. Corp. Comm'n*, 720 F.2d 578, 581 (9th Cir.  
 10 1983). "Dismissal can be based on the lack of a cognizable legal theory or the absence of  
 11 sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901  
 12 F.2d 696, 699 (9th Cir. 1990). A claim for relief must contain "a short and plain statement of the  
 13 claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Though Rule 8(a)  
 14 does not require detailed factual allegations, a plaintiff is required to allege "enough facts to state  
 15 a claim for relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570  
 16 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 677–78 (2009). "A claim has facial plausibility when the  
 17 plaintiff pleads factual content that allows the court to draw the reasonable inference that the  
 18 defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. "The plausibility  
 19 standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility  
 20 that a defendant has acted unlawfully." *Id.* (quoting *Twombly*, 550 U.S. at 556).

21 In determining whether a complaint states a claim on which relief may be granted, the  
 22 court accepts as true the allegations in the complaint and construes the allegations in the light  
 23 most favorable to the plaintiff. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Love v.*

---

24  
 25 <sup>2</sup> The undersigned apologizes to the parties for the excessive delay in the issuance of this order.  
 26 This court's overwhelming caseload has been well publicized and the long-standing lack of  
 27 judicial resources in this district long-ago reached crisis proportion. That situation, which has  
 28 continued unabated for over twenty months now, has left the undersigned presiding over 1,300  
 civil cases and criminal matters involving 747 defendants at last count. Unfortunately, that  
 situation sometimes results in the court not being able to issue orders in submitted civil matters  
 within an acceptable period of time. This situation is frustrating to the court, which fully realizes  
 how incredibly frustrating it is to the parties and their counsel.

1 *United States*, 915 F.2d 1242, 1245 (9th Cir. 1989). However, “[b]are assertions . . . amount[ing]  
 2 to nothing more than a formulaic recitation of the elements . . . are not entitled to be assumed  
 3 true.” *Iqbal*, 556 U.S. at 681. Likewise, the presumption of truth does not attach to “allegations  
 4 that contradict matters properly subject to judicial notice” or to material attached to or  
 5 incorporated by reference into the complaint. *Sprewell v. Golden State Warriors*, 266 F.3d 979,  
 6 988–89 (9th Cir. 2001); *accord Am. Bankers Mgmt. Co., Inc. v. Heryford*, 190 F. Supp. 3d 947,  
 7 951 (E.D. Cal. 2016), *aff’d*, 885 F.3d 629 (9th Cir. 2018)

8 In practice, “a complaint . . . must contain either direct or inferential allegations respecting  
 9 all the material elements necessary to sustain recovery under some viable legal theory.”  
 10 *Twombly*, 550 U.S. at 562. It is inappropriate to assume that the plaintiff “can prove facts which  
 11 it has not alleged or that the defendants have violated the . . . laws in ways that have not been  
 12 alleged.” *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S.  
 13 519, 526 (1983).

## 14 2. Analysis

### 15 a. *Unpaid Wages Claims*

#### 16 i. Failure to properly calculate overtime rates

17 Plaintiff alleges that defendant routinely failed to properly calculate overtime and double  
 18 time pay rates because it failed to include his total compensation (including bonuses and  
 19 commissions) when calculating the regular rate for purposes of determining overtime wages  
 20 owed. (SAC, ¶ 25.) Defendant moves to dismiss this claim, arguing that plaintiff’s own wage  
 21 statements contradict his allegations of wrongdoing. (Doc. No. 10-1 at 5–9.) Defendant asserts  
 22 that the relevant wage statements may be considered in the context of this motion to dismiss  
 23 because they have been incorporated by reference into the complaint. (*Id.* at 6 n.3.)

24 It is true that the SAC specifically references and discusses in some detail wage  
 25 statements issued to plaintiff for June 1 and June 13, 2018. (SAC, ¶¶ 26, 28.) Although the  
 26 documents are not attached to the SAC, the court may nonetheless consider them because they  
 27 form a central pillar of plaintiff’s allegations and their authenticity has not been questioned.  
 28 *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003) (“Even if a document is not attached to

1 a complaint, it may be incorporated by reference into a complaint if the plaintiff refers  
2 extensively to the document or the document forms the basis of the plaintiff's claim."); *see also*  
3 *Knieval v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005) (indicating that a court can consider  
4 documents "whose contents are alleged in a complaint and whose authenticity no party questions,  
5 but which are not physically attached to the [plaintiff's] pleading") (internal quotation marks  
6 omitted); *Achal v. Gate Gourmet, Inc.*, 114 F. Supp. 3d 781, 812 (N.D. Cal. 2015) (considering  
7 wage statements attached by plaintiff to original complaint, even though plaintiff did not attach  
8 them to amended pleading because the authenticity of those documents was not in question).

9 Defendant's motion to dismiss however, does not merely rely on the content of the  
10 incorporated wage statements. Defendant's briefs are filled with counsel's own factual assertions  
11 and interpretations of the wage statements that are unsupported by any evidence, let alone  
12 evidence that can be considered by the court at this stage of the case. For example, defendant  
13 asserts that plaintiff's June 1, 2018 wage statement reflects that defendant made required  
14 adjustments to plaintiff's overtime pay in a line entitled "OT TRUE-UP ADD'L COMP." (Doc.  
15 No. 10-1 at 7.) Although defendant's is not an absurd reading of these words, nothing in the  
16 document itself makes this clear, and the record contains no competent evidence interpreting the  
17 wage statements. Moreover, just like the complaint itself, documents incorporated by reference  
18 must be viewed in a light most favorable to plaintiff in the context of a motion to dismiss.  
19 Viewed in such a light, the wage statements do not explain how overtime rates are adjusted nor  
20 do they demonstrate that those adjustments are being properly calculated. The motion to dismiss  
21 this aspect of plaintiff's failure to pay wages claim will therefore be DENIED.

22 ii. Failure to list all hours worked

23 Plaintiff also alleges that the wage statements fail to properly list all hours worked,  
24 providing one example of a wage statement that shows line items adding up to 106.08 hours while  
25 indicating only 81.98 total hours were worked. (*Id.*, ¶ 27.) Plaintiff asserts that this resulted in a  
26 failure to pay wages for all hours worked at appropriate rates. In support of dismissing this claim,  
27 defendant cites to the decision in *Hernandez v. BCI Coca-Cola Bottling Co.*, No. CV 11-9484  
28 SVW SSX, 2012 WL 12272348 (C.D. Cal. Apr. 12, 2012), *aff'd*, 554 F. App'x 661, 662 (9th Cir.

2014). There, the district court considered allegedly defective wage statements in the context of a motion for summary judgment. *Id.* The wage statements in question in that case contained two line-items for overtime that split the 150% pay owed into two component parts: a line accounting for the 100% “base” pay and a line for the 50% “premium” pay added to the base pay. *Id.* at \*1. At first glance, this caused the total hours worked for all line items to double count any time spent working overtime. *Id.* But the wage statement in *Hernandez* also included an obvious line that showed the total hours worked, which did *not* double count the time spent working overtime. *Id.* The district court concluded the wage statement in that case was sufficient as a matter of law because the statement showed the total hours worked during the pay period. *Id.* at \*3.

The wage statements at issue here have some similarities to those in *Hernandez* but are noticeably more complicated. For example, the June 1, 2018 statement has more than a dozen line items. If only the “regular” and “overtime base” line items are added together, the hours in those line items equal the total hours worked listed at the top of the statement. But, as plaintiff correctly points out, if all of the hours listed in the line items are added together, they total far more than the listed “total hours worked.” Although the court could make educated guesses as to why certain line items are or are not included in the total hours worked, nothing before the court clearly explains the nature of each category. Again, the court is not permitted to consider counsel’s explanations and arguments as to why the total provided is correctly reflected by the line items. The court is not moved by the fact that *Hernandez* approved on summary judgment wage statements with somewhat similar, but much less complicated, double-counting issues. The motion to dismiss this claim will therefore also be DENIED.

b. *Unlawful Wage Statements Claim*

Plaintiff next alleges that on a routine basis defendant failed to provide wage statements compliant with California Labor Code § 226 because hours and rates were not properly shown. (SAC, ¶ 29.) Defendant argues that these claims are untimely in light of California Code of Civil Procedure § 340, which sets forth a one-year statute of limitations applicable to any action seeking statutory damages. (Doc. Nos. 1-4 at 2 (original filing in state court); 10-1 at 9 (argument).) According to defendant, because the SAC alleges that plaintiff ended his

1 employment in June 2018, plaintiff had until June 2019 to file an action for penalties owed due to  
2 any allegedly unlawful wage statements. (Doc. No. 10-1 at 9.)

3 Plaintiff responds in two ways. First, he points out that the SAC indicates that plaintiff  
4 continued to receive wage payments and statements as late as August 2018. (Doc. No. 11 at 9;  
5 *see also* SAC, ¶ 35 (alleging “the latest payment date [was] made as late as August 2018”).)  
6 Defendant acknowledges this in its reply but maintains that the only wage statement issued to  
7 plaintiff within the one-year limitations period—a statement for the October 5, 2018 pay period—  
8 cannot form the basis of plaintiff’s claim because that wage statement was “lawful.” (Doc. No.  
9 15 at 10.) Specifically, defendant contends that because plaintiff did not actually work from  
10 September 16 through September 29, 2018 (the period covered by the October 5, 2018 wage  
11 statement) the wage statement was not required to provide “applicable hourly rates in effect” and  
12 instead properly reflected a miscellaneous payment of \$20.00 as a “misc payment-no tax.” (*Id.*)  
13 This too is merely an unsupported argument. Nothing properly before the court explains what the  
14 “MISC PAYMENT” was for or why it should or should not reflect an underlying hourly wage.  
15 Therefore, to the extent defendant is moving to dismiss any claims premised upon the wage  
16 statement for the October 5, 2018 pay period, that motion will be DENIED as well.

17 Second, plaintiff suggests that the one-year statute of limitations period does not apply  
18 here at all because he is seeking damages, not just statutory penalties. (Doc. No. 11 at 9.)  
19 Plaintiff is correct that where damages, rather than statutory penalties, are requested, a three-year  
20 statute of limitations applies. *Novoa v. Charter Commc’ns, LLC*, 100 F. Supp. 3d 1013, 1025  
21 (E.D. Cal. 2015) (“depending on the relief sought, a claim pursuant to Section 226(e)(1) could be  
22 subject to a one-year or a three-year limitations period”). The SAC is not a model of clarity in  
23 this regard. It generally requests damages in several places. (*See* SAC, ¶¶ 53, 55.) However, the  
24 relevant wage statement cause of action specifically requests only “penalties according to proof.”  
25 (*Id.*, ¶ 94.)<sup>3</sup> To the extent the SAC is unclear about plaintiff’s intent to seek damages in  
26 connection with his wage statement claim, leave to amend would be appropriately granted at this

---

27 <sup>3</sup> The same claim does quote language from Cal. Labor Code § 226 that permits a plaintiff to  
28 either recover damages or statutory penalties for a wage statement violation. (*Id.*, ¶ 89.)

1 early stage of the proceedings—where class discovery has not yet even begun.<sup>4</sup> The court will  
2 permit plaintiff an opportunity to clarify his prayer for relief in an amended pleading.

3 c. *Meal Period Premium Claim*

4 Plaintiff asserts that meal period premiums were not paid at the proper rate. (SAC, ¶ 28.)  
5 Defendant moved to dismiss this claim (Doc. No. 10-1 at 11), arguing that the claim is premised  
6 upon a “nonactionable theory” rejected by the California Court of Appeals in *Ferra v. Loews*  
7 *Hollywood Hotel, LLC*, 40 Cal. App. 5th 1239, 1252 (2019), which held that employers are only  
8 obligated to compensate employees with a full extra hour for missed meal/rest breaks at their base  
9 hourly rate. However, that appellate decision was overruled by the California Supreme Court on  
10 July 15, 2021, *Ferra v. Lowes Hollywood Hotel, LLC*, 11 Cal. 5th 858 (2021), which concluded  
11 unanimously that meal and rest break premiums must be calculated at the same “regular rate of  
12 pay” used to calculate overtime pay, a calculation that encompasses all nondiscretionary  
13 payments, not just hourly wages. The California Supreme Court’s decision in *Ferra* requires  
14 denial of this aspect of defendant’s motion to dismiss.

15 d. *Waiting Time Claim*

16 Finally, plaintiff claims that defendant failed to timely pay him wages due at termination  
17 of employment as required by California Labor Code § 201 (or alternatively within 72 hours of  
18 resignation as required by § 202) and therefore that defendant owes waiting time penalties under  
19 § 203. (SAC, ¶ 33.) The SAC specifically alleges that plaintiff’s last day of work was in June  
20 2018 but that he continued to receive payments as late as August 2018, more than 30 days after  
21 his employment ended. (*Id.*, ¶ 83.) Defendant argues that this claim should be dismissed because  
22 the payments on which plaintiff bases his own waiting time claim were only calculable after his  
23 termination. (Doc. No. 10-1 at 11.) Defendant correctly points out that the requirement for  
24 paying wages at termination may be excused for certain types of pay that are not calculable at the  
25 time of termination. (Doc. No. 15 at 8 (citing *Nordstrom Comm. Cases*, 186 Cal. App. 4th 576,  
26 588 (2010)). But as the decision in *Nordstrom* itself suggests, this is a fact-intensive inquiry.  
27 There, the court was considering whether to approve a settlement that included, among other

---

28 <sup>4</sup> The court notes that defendant continues to object to class discovery in part because these motions have remained pending before the court. (Doc. Nos. 31, 36.)



1 things, a claim regarding the timeliness of post-termination commission payments. *Nordstrom*,  
 2 186 Cal. App. At 587–88. The court in *Nordstrom* found there was a *bona fide* dispute over when  
 3 such commissions became calculable considering the specific facts of that case, including  
 4 Nordstrom’s pre-existing system of computing and paying net commissions at the next pay  
 5 period. *Id.*

6 Here, the SAC highlights five types of payments that plaintiff allegedly received late:  
 7 “[1] Cash Awards, [2] Commission, [3] Taxable non-cash Awards, [4] Misc. Payment, and  
 8 [5] recalculation of overtime differential pay.” (SAC, ¶ 84.) Defendant asserts that “each, on  
 9 their face, represents payments that cannot be made at termination.” (Doc. No. 10-1 at 11.)  
 10 While this may be self-evident to counsel, it is not to the court. There is simply no record upon  
 11 which the court could decide at this stage of the proceedings that the five categories of payments  
 12 listed were not calculable at termination. Defendant has not cited, and the court has not located,  
 13 any authority suggesting that it is plaintiff’s burden to affirmatively allege at the pleading stage  
 14 that payments he received well after termination were in fact calculable at the time of termination.  
 15 Defendant’s motion to dismiss the waiting time claim will therefore also be DENIED.

16 **B. Motion to Stay Pending Resolution of *Ayala*.**

17 Defendant next moves to stay this case pending the conclusion of an earlier-filed, similar  
 18 lawsuit pending in the U.S. District Court for the Central District of California: *Ayala v. AT&T*  
 19 *Mobility Services, LLC, et al.*, No. 2:18-cv-08809-SVW-MRW. (Doc. No. 10-1 at 12.)  
 20 Defendant requests that the court exercise its discretion under the “first to file” rule to stay this  
 21 case. (*Id.*) Under that doctrine, a court “analyzes three factors: chronology of the lawsuits,  
 22 similarity of the parties, and similarity of the issues.” *Kohn L. Grp., Inc. v. Auto Parts Mfg.*  
 23 *Mississippi, Inc.*, 787 F.3d 1237, 1240 (9th Cir. 2015). The *Ayala* action was initiated on August  
 24 22, 2018 (*Ayala*, Doc. No. 1-4<sup>5</sup>), approximately one year before this matter was initiated in the  
 25 Madera County Superior Court on August 27, 2019 (Doc. No. 1-4). The issues raised also appear  
 26 to be similar. (*Compare* *Ayala*, Doc. No. 52 (*Ayala*’s third amended complaint) *with* SAC.)  
 27 Likewise, the first-to-file rule does not require strict identity of parties, but rather only  
 28

---

<sup>5</sup> The court takes judicial notice of the *Ayala* docket and its contents. Fed. R. Evid. 201(b).



1 “substantial similarity,” which may be satisfied in the class context where the two cases propose  
 2 to represent at least some of the same individuals. *See Adoma v. Univ. of Phoenix, Inc.*, 711 F.  
 3 Supp. 2d 1142, 1147 (E.D. Cal. 2010). This appears to be the case here, where the proposed class  
 4 in *Ayala* is made up of call center employees, a subset of the class proposed in this action.  
 5 (*Compare* *Ayala*, Doc. No. 52, ¶ 2, with SAC, ¶ 45.)

6 Yet even assuming the three requirements of the first-to-file rule are satisfied “it does not  
 7 follow that application of the rule is appropriate. The doctrine is discretionary and, accordingly,  
 8 the court may disregard it in the interests of equity.” *Id.* at 1149. “The circumstances under  
 9 which an exception to the first-to-file rule typically will be made include bad faith, . . .  
 10 anticipatory suit, and forum shopping.” *Alltrade, Inc. v. Uniweld Products, Inc.*, 946 F.2d 622,  
 11 628 (9th Cir. 1991). In exercising its “broad” discretion under this doctrine, a court may consider  
 12 demonstrations of prejudice. *Adoma*, 711 F. Supp. 2d at 1149. It is for just this reason that the  
 13 court declines to stay this case at this time.

14 The record now reveals that defendant has settled yet another class action case raising  
 15 claims similar to those presented here and in *Ayala*. That case was apparently settled on March  
 16 29, 2021 but was not filed until June 22, 2021 in San Bernardino County Superior Court (*Wallack*  
 17 *et al. v. AT&T Mobility*, No. CIVSB2117915). (*See* Doc. No. 24 at 7, 13.) Meanwhile, in May  
 18 2021, defendant refused to produce class wide discovery in this case, while never mentioning that  
 19 it had already settled a parallel class action. (*Id.* at 13.) Generally, plaintiff Razo contends that  
 20 there are indications of collusion between defendant and class counsel in *Wallack*. (*Id.* at 23–24.)  
 21 Although the fairness of the settlement in *Wallack* is not before this court, plaintiff’s counsel in  
 22 this case has moved to be appointed class counsel on an interim basis to facilitate counsel’s  
 23 intervention in the *Wallack* case.<sup>6</sup> Staying this action at this time would have the effect of  
 24 significantly impeding plaintiff’s efforts to be heard in *Wallack*. Although the court expresses no  
 25 opinion on the merit of plaintiff’s contentions about the *Wallack* settlement, the court does  
 26

---

27  
 28 <sup>6</sup> The *Wallack* settlement apparently has carved out plaintiff Razo and named plaintiffs in other  
 earlier-filed actions, limiting the ability of each of those individuals to intervene in *Wallack* or to  
 object to the settlement. (*See* Doc. No. 24 at 21.)

1 believe that the San Bernardino County Superior Court likely will want to be made aware of  
2 plaintiff's concerns.

3 **CONCLUSION**

4 Accordingly, for the reasons explained above:

- 5 1. Defendant's motion to dismiss or to stay (Doc. No. 10) is DENIED; and  
6 2. Plaintiff is granted leave to file an amended complaint within 30 days of the date of  
7 entry of this order to address the issue of a prayer for damages in connection with his  
8 wage statement claim.

9 IT IS SO ORDERED.

10 Dated: **October 13, 2021**

11   
12 UNITED STATES DISTRICT JUDGE